October 28, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Eugenie Reich

Date of Filing: September 29, 2008

Case Number: TFA-0279

On September 29, 2008 1/ , Eugenie Reich (Reich) filed an Appeal from a determination issued to her on January 15, 2008, by the FOIA and Privacy Act Group of the Department of Energy (DOE/HQ) in response to a request for documents that Reich submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that DOE/HQ release responsive material.

I. Background

In December 2006, Reich filed a FOIA request with DOE/HQ seeking: (1) records that would identify the members of a panel convened to investigate allegations of fraud and research misconduct at Oak Ridge National Laboratory in 2006; and (2) the final investigation report from the panel. 2/ On January 15, 2008, DOE/HQ issued a determination which stated that the DOE Office of Science (DOE/OS) conducted a search of its files for responsive documents. According to DOE/OS, that search located one document responsive to Reich's request, "the draft document 'Report on Allegations of Research Misconduct'"(hereinafter referred to as "Draft Report"). Letter from DOE/HQ to Reich, January 15, 2008 (Determination Letter). According to DOE/HQ, the responsive document is a "draft copy of a report of an investigation into allegations of research misconduct or fraud in connection with work that was carried out by an Agency contractor, UT-Battelle." DOE/HQ further stated that this document was being withheld in its entirety pursuant to Exemptions 5 and 6

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[1] Reich submitted a detailed justification for the delay in filing her appeal of the agency's determination beyond the 30-day appeal period provided in DOE's regulations. *See* C.F.R. § 1004.8(a). Before proceeding with this appeal, we also confirmed with DOE/HQ and DOE/OGC that the factual and legal bases for the agency's determination are still applicable; that is, that the determination has not been rendered moot by the passage of time or by events having occurred during the period between the issuance of the determination and the date of the appeal.

[2] These are the same documents that were the subject of the request that led to two prior appeals. *See Eugenie Reich,* 29 DOE ¶ 80,289 (2007); *Eugenie Reich*, 29 DOE ¶ 80,315 (2007).

of the FOIA. *Id.* On September 29, 2008, Reich filed the present Appeal with the Office of Hearings and Appeals (OHA). In her Appeal, Reich asserts that the responsive document was improperly withheld under Exemptions 5 and 6 and asks OHA to order DOE/HQ to release the responsive document. *See* Appeal Letter.

II. Analysis

Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 149 (1975). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "predecisional" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). In withholding the responsive document from Reich, DOE/HQ relied upon the "deliberative process" privilege of Exemption 5.

The "deliberative process" privilege of Exemption 5 permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Cl. Ct. 1958)). The ultimate purpose of the exemption is to protect the quality of agency decisions. *Sears,* 421 U.S. at 151. In order to be shielded by Exemption 5, a document must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The exemption thus covers documents that reflect, among other things, the personal opinion of the reviewers rather than the final policy of the agency. *Id*.

After reviewing the requested document, we have concluded that the determination made by DOE/OS in applying Exemption 5 was correct and consistent with the principles outlined above. First, the document withheld from Reich consists of comments, preliminary findings and opinions prepared by an independent investigating committee and intended only for internal DOE use. In her Appeal, Reich asserts, *inter alia,* that the Report does not meet the threshold test of "inter-agency or intra-agency memorandum." We disagree and find that the information requested in this case properly falls within the definition of "intra-agency memoranda" pursuant to Exemption 5 of the FOIA. Courts have routinely held that documents provided by an agency's contractor employees or by outside consultants may be considered "intra-agency memoranda" for the purposes of Exemption 5. The Court of Appeals for the District of Columbia Circuit observed in *Ryan v. Department of Justice* that "Congress apparently did not intend 'inter-agency or intra-agency' to be

rigidly exclusive terms, but rather to include [nearly any record] that is part of the deliberative process." *Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980). The court included in this category recommendations from Members of Congress, recommendations from judges and special prosecutors, recommendations from an agency to a commission established to assist another agency's policymaking, and documents provided by an agency's contractor employees. *See Ryan,* 617 F.2d at 790; *see also Sakamoto v. EPA*, 443 F. Supp. 2d 1182, 1191 (N.D. Cal. 2006) (upholding agency's invocation of Exemption 5 to protect documents prepared by private contractor hired to perform audit for agency). Furthermore, courts have applied a common-sense approach to documents generated by consultants outside of an agency and found that these documents generally qualify for Exemption 5 protection because in the exercise of their functions, agencies have "a special need for the opinions and recommendations of temporary consultants." *See Soucie v. David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971); *cf. CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1161 (D.C. Cir. 1987) (observing the importance of outside consultants in deliberative process privilege context). The independent investigation committee in this case clearly serves the needs of the agency. 3/

Second, the comments, recommendations and opinions contained in the Draft Report are clearly predecisional and deliberative. DOE/HQ asserts that the responsive document at issue is a draft, and is marked as a draft, and "the evidence suggests that the final version of the Draft Report, on which Agency officials received a briefing, differed from the draft copy, as the draft Report consisted only of the first sixteen pages of text, and did not include Appendices A-I." Determination Letter. In addition, it asserts that Exemption 5 protects against "the premature disclosure of draft documents before they are finally adopted and against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for any agency's decision." *Id.* We agree. This Draft Report discusses observations and findings that were subject to further agency review and do not represent final agency position. Accordingly, we hold that the Draft Report was properly withheld in its entirety under the Exemption 5 deliberative process privilege.

Public Interest Determination

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. In this case, no public interest would be served by release of the withheld material in the documents at issue, which consists solely of advisory opinions, observations and findings provided to DOE in the consultative process. The release of this deliberative material could have a chilling effect upon the agency. The ability and willingness of DOE consultants to

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[3] We note that Reich, in her assertion that the Draft Report does not meet the "inter-agency or intra-agency memorandum" threshold test of Exemption 5, discusses the *Klamath* case. In a recent case, we interpreted the holding in *Klamath* narrowly. On the basis of our interpretation of *Klamath,* its ruling does not apply in this case. *See State of New York,* 30 DOE ¶____(2008).

make honest and open recommendations concerning similar matters in the future could well be compromised. If DOE consultants were inhibited in providing information and recommendations, the agency would be deprived of the benefit of their open and candid opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (1987).

Exemption 6

Exemption 6 of the FOIA protects from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether a document may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be compromised by the disclosure of the record. If no privacy interest is identified, the document may not be withheld pursuant to Exemption 6. *Ripskis v. Department of Housing and Urban Development*, 746 F.2d 1,3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989). Third, the agency must balance the identified privacy interests against the public interest in order to determine whether release of the document would constitute a clearly unwarranted invasion of personal privacy under Exemption 6. *See generally Ripskis*, 746 F.2d at 3.

In this case, DOE/HQ found a privacy interest in the identities and personal information of ORNL employees being investigated regarding allegations of research misconduct as well as in the names of the outside investigators tasked with examining the allegations. Because of the obvious possibility of harassment, intimidation, or other personal intrusions, the courts have consistently recognized significant privacy interests in the identities of individuals whose names are contained in investigative documents. *Safecard Services, Inc. v. S.E.C.*, 926 F.2d 1197 (D.C. Cir. 1991); *KTVY-TV v. United States*, 919 F.2d 1465, 1469 (10th Cir. 1990) (finding that withholding identity necessary to avoid harassment of individual). Accordingly, our office has followed the courts' lead. *James L. Schwab*, 21 DOE ¶ 80, 117 at 80,556 (1991); *Lloyd R. Makey*, 20 DOE ¶ 80,129 (1990).

In *Reporters Committee*, the Supreme Court narrowed the scope of the public interest in the context of the FOIA. The Court found that only information which contributes significantly to the public's understanding of the operations or activities of the Government is within "the ambit of the public interest which the FOIA was enacted to serve." *Id.* The Court therefore found that unless the public would learn something directly about the workings of government from the release of a document, its disclosure is not "affected with the public interest." *Id.; see also National Ass'n of Retired Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990). Reich asserts that there is a public interest, specifically in the "sense of public oversight of

government operations," in knowing identities in the Draft Report. *See* Appeal Letter at 7. We disagree. We fail to see how release of the identities of individuals in the present case would inform the public about the operations and activities of Government. Releasing the names and identifying information of ORNL employees being investigated as well as the names and identifying information of the outside investigators would add little to the public's analysis of any allegations of misconduct, but would rather "have a chilling effect on future independent researchers' willingness to participate in the important process of peer-reviewing one another's work." *See* Determination Letter at 2. Accordingly, we find that there is little or no public interest in disclosure of the individuals' identities.

After weighing the significant privacy interests present in this case against a minimal public interest, we find that release of information revealing an individual's identity would constitute a clearly unwarranted invasion of personal privacy. Therefore, we find that the identities of individuals in the Draft Report were properly withheld under Exemption 6.

III. Conclusion

We have reviewed and considered all of Reich's arguments. For the reasons stated above, we have determined that DOE/HQ properly applied Exemptions 5 and 6 of the FOIA in withholding the responsive document at issue from Reich. Therefore, Reich's appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Eugenie Reich on September 29, 2008, OHA Case No. TFA-0279, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: October 28, 2008